

UNIVERSITY OF CINCINNATI LAW REVIEW



Volume 70, No. 3

Spring 2002

APPELLATE COURTS AND CIVIL JURIES

*Stephan Landsman**

I. THE PERSISTENCE OF THE CIVIL JURY

*Plus ça change, plus c'est la même chose.*¹

The civil jury is virtually the only Anglo-American adjudicatory device to have functioned serviceably for more than 900 years. Its long history reflects not the endurance of a sanctified relic but the adaptability of a decision-making mechanism that affords society substantial and unique benefits. Civil juries remain, today, a fundamental component of the judicial branch of American government, cemented in place by the U.S. Constitution and the constitutions of forty-seven of the fifty states.² They do not operate in isolation but rather in conjunction with trial judges and under the supervision of appellate courts. Judicial control over civil jury activity is, at least in theory, cabined by a series of powerful constraints, foremost among which (at least in federal courts)³ is the Seventh Amendment, which provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.⁴

* Robert A. Clifford Professor of Tort Law and Social Policy, DePaul University College of Law.

1. Alphonse Karr, *Les Guêpes* (1849), reprinted in CHAMBERS DICTIONARY OF QUOTATIONS 542 (Alison Jones ed., 1996) ("The more things change, the more they stay the same.").

2. For a listing of the forty-seven states see Paul Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 U. CHI. L. REV. 179, 181 n.14 (1998).

3. For ease of analysis this essay will focus on the federal courts, where a rich body of judicial and scholarly work has been developed regarding the relations between appellate courts and civil juries. There is reason to suspect that, at least in some states, circumstances are different than in the federal courts. See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 668-69.

4. U.S. CONST. amend. VII.

In its earliest avatar,⁵ the civil jury was used by the Norman conquerors of England to gather information essential to the governance of the realm.⁶ It was, in these times, essentially an administrative body that reported facts pertinent to taxation and other governmental functions. Henry II, in the late twelfth century, changed the civil jury's orientation by giving it an adjudicatory role in property-related disputes. The jury proved an attractive alternative to ordeal, battle, and compurgation. From Henry II's time on it grew in popularity and jurisdictional reach. With the 1215 papal ban on ecclesiastical participation in trials by ordeal and combat, the jury became the pre-eminent method of civil dispute resolution in England.

At first, the jury was conceived as a group of more or less knowledgeable neighbors who were called upon to resolve disputes on the basis of what they knew. By the middle of the fourteenth century, however, the English had adopted procedures which made it clear that the jury was not simply a collection of witnesses, but a deliberative body. The key in this regard was the requirement of a unanimous verdict, which meant that the differing perspectives of the jurors had to be harmonized into a single shared decision. Over the course of the next several hundred years, the jury gradually shifted from reliance on its own knowledge to dependence on the testimony of witnesses in open court. The jury was thus transformed into an evaluator of proofs. By the late seventeenth century, the civil jury was well on its way to becoming the neutral and passive factfinder that is at the heart of the modern American adversary system.⁷ Although over the course of its history the jury has changed functions and sources of information, from the thirteenth century on it has operated as the primary adjudicator of

5. Dawson, among others, has rightly pointed out the existence of Anglo-Saxon antecedents to the Norman jury. JOHN DAWSON, *A HISTORY OF LAY JUDGES* 118-20 (1960).

6. For a summary of the early history of the civil jury, see Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 *HASTINGS L.J.* 579 (1993). Unless otherwise noted, the materials in this section are drawn from the *HASTINGS* piece.

7. For a detailed examination of the development of the adversary system in English criminal courts, see Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 *CORNELL L. REV.* 497 (1990).

a range of civil disputes, an adjudicator drawn from the citizenry and entrusted with the mission of dispensing justice.

Not only did the civil jury grow into the key courtroom decision maker, it slowly evolved into an instrument of democratic representation and a school for self-governance among Englishmen. Jury service placed substantial responsibility in the hands of local citizens. Jurors took their responsibilities seriously and, over time, came to see it as not only their duty but their *right* to manage their communities and make important decisions. English justice was, thus, decentralized and determined by local men rather than the King's minions. Despite this, many of England's most powerful citizens sought from the very earliest days to avoid the burdens and tedium of jury service.⁸ In their stead, citizens of modest means—in other words of the “middling sort”⁹—served on a regular basis.

By the 1600s, the jury was the most representative institution available to the English people.¹⁰ Its attachment to self-governance led to conflicts with the Crown when, at the end of the seventeenth century, the Stuart Kings sought to consolidate power in royal hands. In 1670, a jury refused, despite imprisonment, to convict the Quaker preachers William Penn and William Mead. The overturning of the jurors' jailing, in *Bushell's Case*,¹¹ expanded juror independence. That ruling was followed by a series of celebrated jury decisions, the most remarkable being the verdict in the case of the *Seven Bishops*,¹² in which a jury of common Englishmen thwarted the attempt of James II to crush the Bishops and bend the Church of England to his will. Historians have rightly described this as the true beginning of the Glorious Revolution, which resulted in the overthrow of absolute monarchy and the establishment of the pre-eminence of Parliament. Through the 1700s, English juries kept up their resistance to government overreaching and, in the 1760s, decided a pair of cases allowing the recovery of substantial punitive damages in civil cases involving government misbehavior.¹³

8. Statutes from the reign of Edward I decried the use of impoverished and enfeebled jurors in the place of their rich neighbors. See 13 Edw. 1 (West 2) c. 38 (1285); 21 Edw. 1 (1293).

9. P.G. Lawson, *Lawless Juries? The Composition and Behavior of Hertfordshire Juries, 1573-1624*, in TWELVE GOOD MEN AND TRUE 117, 133 (J.S. Cockburn & Thomas Green eds., 1988) [hereinafter TWELVE GOOD MEN].

10. Stephen K. Roberts, *Juries and the Middling Sort: Recruitment and Performance at Devon Quarter Sessions*, in TWELVE GOOD MEN, *supra* note 9, at 182.

11. 124 Eng. Rep. 1006 (C.P. 1670).

12. For a description of that case see 2 THE WORKS OF LORD MACAULAY 153 (Lady Trevelyan ed., 1866), reprinted in STEPHEN PRESSER & JAMIL ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY 10, 12 (2d ed. 1989).

13. See *Wilkes v. Wood*, 98 Eng. Rep., 489, 499 (K.B. 1763); *Huckle v. Money*, 95 Eng. Rep. 768, 768 (K.B. 1763).

The American colonists embraced the jury. From the earliest days, colonial charters recognized jury trials as an essential facet of government both for purposes of administration and adjudication. American juries eventually became something of a bulwark against government oppression. The 1734 trial of Peter Zenger¹⁴ on a charge of seditious libel is but one example of American jurors' willingness to resist the exercise of government power. Though the law was clear and appeared to require Zenger's conviction, a New York jury refused to find the editor guilty, thereby establishing a critical precedent regarding jury independence.¹⁵ In the period between 1750 and the start of the Revolutionary War, juries were in the forefront of resistance to imperial dictates, very much as English juries had been before the Glorious Revolution. Various colonial congresses demanded protection of the right to jury trial, and the Declaration of Independence listed denial of "the benefits of Trial by Jury" among the grievances warranting the creation of a new nation.¹⁶

Although the jury had played a heroic part in the Revolution and was one of the most widely respected elements of colonial governance, when the drafters came to fashion the Constitution, they did not include any mention of the right to a civil jury trial. This exclusion was defended by the drafters on the grounds that the British judges who had run colonial courts in the interest of imperial masters were gone, democratic legislatures were now responsible for the fashioning of America's laws, and the post-Revolution anti-creditor decisions of some juries were undermining the stability of the new nation's financial system. Despite these arguments, the civil jury's exclusion from the Constitution ignited a firestorm of protest that led at least seven states to insist on an amendment to the Constitution to protect the right of jury trial in civil litigation. That insistence resulted in the adoption of the Seventh Amendment, and the democratic concepts implicit in jury trial came to permeate the Bill of Rights. As Professor Akil Amar has put it: "If we seek a paradigmatic image underlying the Bill of Rights, we cannot go far wrong in picking the jury. . . . The jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights."¹⁷ The jury had come a long way from its rough-and-tumble beginnings as an administrative entity.

14. See JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER PRINTER OF THE NEW YORK WEEKLY JOURNAL (Stanley Katz ed., 2d ed. 1972).

15. The approach adopted by the Zenger jury in responding to a charge of seditious libel (*i.e.*, insisting upon a general verdict) was embraced by Parliament in 1792, in Fox's Libel Act, 32 Geo. 3, c. 60 (1790) (Eng.).

16. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

17. Akil Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1190 (1991).

It had become the democratic counterbalance to an unelected judiciary and an expression of America's faith in its citizens.

The civil jury continued on its protean path throughout the 1800s. In the early part of the century the jury served as an instrument of compromise between contending Federalists and Republicans. In confrontations like that involving the impeachment of Federalist Pennsylvania State Court Judge Alexander Addison and Federalist Supreme Court Justice Samuel Chase, compromise meant that judges would be left in office, no matter what their political affiliations, so long as they refrained from overt politicking on the bench and did not seek to override jury prerogatives and opinions. As Alexis de Tocqueville observed in the 1830s, the jury had become the quintessential American "political institution,"¹⁸ balancing and accommodating the competing concerns of contending social forces. Because of the jury's presence, a judiciary made especially potent in the wake of *Marbury v. Madison*¹⁹ was perceived as less threatening than it might otherwise have been.

As the century wore on, however, judges sought greater control over juries. This may be seen in the elaboration of the rules of evidence, increased reliance on jury instructions,²⁰ and augmented use of doctrines like contributory negligence to curb jury decision making. Although these devices shifted power away from jurors into the hands of judges, their scope was eventually limited by a backlash against harsh and meddlesome rules. This backlash led to changes such as the adoption of the rule of comparative negligence, which heightened jury discretion with respect to the apportionment of fault. The jury's critics were not deterred by such setbacks. In the Progressive Era, the jury was attacked as an inefficient and amateur body that was in need of restraint. Early legal realists like Charles Clark and Harry Shulman took up these views and attempted to support them with empirical data.²¹ Their efforts, however, proved unpersuasive. In contrast, in the 1950s, Harry Kalven and Hans Zeisel turned their attention to the jury as an object of social science study and developed data they believed demonstrated the particular value of the jury trial. Professor George Priest, no great friend of the jury, has said of Kalven and Zeisel's work:

18. ALEXIS DE TOCQUEVILLE, 1 *DEMOCRACY IN AMERICA* 281 (Alfred A. Knopf ed., 15th ed. 1985) (1830) [hereinafter *DEMOCRACY IN AMERICA*].

19. 5 U.S. (1 Cranch) 137 (1803).

20. Lawrence Friedman, *Some Notes on the Civil Jury in Historical Perspective*, 48 *DEPAUL L. REV.* 201, 204-05 (1998).

21. See Charles E. Clark & Harry Shulman, *Jury Trial in Civil Cases—A Study in Judicial Administration*, 43 *YALE L.J.* 867 (1934).

Over the past quarter century . . . support for the civil jury has become nearly unanimous. In large part, the overwhelming modern belief in the importance of the civil jury can be attributed to the influential work of the University of Chicago Jury Project led by Harry Kalven and Hans Zeisel. In its time, the Kalven-Zeisel Jury Project was the most ambitious empirical study of jury decisionmaking that had ever been attempted. As a result of their extensive empirical analysis, the authors claimed that the civil jury was a superior institution for adjudicating disputes involving complex societal values, that the jury served as an important instrument of popular control over law enforcement, and that the jury brought a superior sense of social equity to the decisionmaking process. Indeed, the authors interpreted their empirical findings to confirm simultaneously each of these assertions.²²

The civil jury arrived in the 1970s with strong empirical support and a long history of adaptation to social needs. Yet within a fairly brief span, the Supreme Court demonstrated its intention to hack away at the institution. It did so by allowing a diminution in jury size from twelve to six in *Colgrove v. Battin*.²³ The Court claimed that the civil jury served but a single purpose: "[T]o assure a fair and equitable resolution of factual issues."²⁴ This reductionist view ignored the jury's role in perpetuating democracy, in guaranteeing the representativeness of the group adjudicating important social issues, in fixing benchmarks for the appropriate compromise of the vast majority of cases that are settled rather than litigated, and in legitimating the decisions of the judicial branch of government. Some years later, in *Ballew v. Georgia*,²⁵ the Supreme Court conceded that its analysis in *Colgrove* had been flawed but refused to restore the twelve-person jury, thereby perpetuating the damage it had caused.

Despite all this, the jury has endured. Although its size has been shrunk (at least in some jurisdictions) and its prerogatives narrowed by restrictive evidence rules and jargon-filled legal instructions, the jury remains the adjudicator of hard cases and the voice of public sentiment. It has displayed such attributes in recent cases like those involving the claims of Florida smokers against the tobacco industry²⁶ and those

22. George Priest, *The Role of the Civil Jury in a System of Private Litigation*, 1990 U. CHI. LEGAL F. 161, 162 (footnotes omitted).

23. 413 U.S. 149, 159-60 (1973).

24. *Colgrove*, 413 U.S. at 157.

25. 435 U.S. 223, 231-39, 243 (1978).

26. See *Engle v. Am. Tobacco Co.*, No. 94-08273 CA-3 (Fla. Cir. Ct. Nov. 6, 2000) (Final Judgment & Amended Omnibus Order). For earlier proceedings in the same case, see *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39 (Fla. Dist. Ct. App. 1996).

concerned with the fouling of Alaskan waters by the Exxon Valdez.²⁷ There are even signs of its reinvigoration including, most particularly, its growth into a far more representative body than it had ever been before. In a series of cases stretching back to the 1880s, the Supreme Court has worked to insure the increased presence of minorities and women on jury panels. Those efforts have finally borne fruit, and today, American juries are far more representative than they used to be.²⁸ Moreover, jury duty has been rationalized and long indolent waits to serve have been ended, replaced by efficient one-day-one-trial approaches. Arizona, New York, California, Colorado and a number of other states have introduced a mass of jury-friendly reforms.²⁹ This past year, the New York Unified Court System and the National Center for State Courts convened a "National Jury Summit" that was attended by more than 400 persons and was designed to further the process of improvement in the operation of the jury.³⁰ As on so many other occasions, the jury seems to have been refashioned to meet society's changing needs.

27. *In re The Exxon Valdez*, 104 F.3d 1196 (9th Cir. 1997).

28. See Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 355-57 (1995).

29. See AM. JUDICATURE SOC'Y, ENHANCING THE JURY SYSTEM, A GUIDEBOOK FOR JURY REFORM (1999); NAT'L CTR. FOR STATE COURTS, JURY TRIAL INNOVATIONS (G. Thomas Munsterman et al. eds., 1997); G. Thomas Munsterman & Paula Hannaford, *Reshaping the Bedrock of Democracy: American Jury Reform During the Last 30 Years*, 36 JUDGES' J. 5 (1997).

30. See *New York UCS, NCSC Convene National Jury Summit*, 12 SJI NEWS No. 1, Spring 2001, at 1. SJI News is the newsletter of the State Justice Institute.